

APPENDIX A

LEXSEE 1984 U.S. COMP. GEN. LEXIS 972

The Honorable Bill Alexander, U.S. House of Representatives

B-213137

Comptroller General of the United States

63 Comp. Gen. 422; 1984 U.S. Comp. Gen. LEXIS 972

June 22, 1984

OPINION:

[*1]

Dear Mr. Alexander:

By letter dated January 25, 1984, you requested that we provide you with a formal legal decision regarding the propriety of funding methods used by the Department of Defense (DOD) in its recent joint combined exercises in Honduras. This letter responds to your request. We would emphasize that the sole concern of our legal review relates to DOD's use of appropriations in carrying out its activities in Honduras, and not to the policy implications of those activities.

On the question of DOD's use of exercise operation and maintenance (O&M) funds, we found the following:

DOD may use O&M appropriations, under authority of *10 U.S.C. § 2805(c)*, to finance minor military construction projects under \$200,000. Thus, to the extent that DOD's construction activities in Honduras fell within this \$200,000 limit, use of O&M funding was proper. Apart from this specific authority, however, DOD's construction expenses may not be charged to O&M as operational costs, but must be charged to funds available for military construction (or, in some cases, security assistance). Consequently, O&M funding of construction activities in Honduras in excess of that permitted under *10 [*2] U.S.C. § 2805(c)* was improper.

Site preparation and installation costs of establishing radar facilities in Honduras, if under \$200,000 per project, may also be charged to O&M as minor military construction under *10 U.S.C. § 2805(c)*. Again, however, O&M funding of such activities in excess of that permitted under *10 U.S.C. § 2805(c)* was improper. Costs of operating these facilities were properly chargeable to O&M.

Costs pertaining to training of Honduran armed forces during, or in preparation for, the Ahuas Tara II exercise should have been financed as security assistance to Honduras. Use of O&M funds for such activities was unauthorized.

DOD has no separate authority to conduct civic action or humanitarian assistance activities, except on behalf of other Federal agencies (such as AID) through the Economy Act, *31 U.S.C. § 1535*, or (for minor projects) as incidental to the provision of security assistance. Such activities conducted in Honduras during the course of Ahuas Tara II were improperly charged to DOD's O&M appropriations.

The grounds for our conclusions as to proper funding sources are set out in detail in the classified appendix.

Regarding your further questions as to [*3] possible violations of the funding purposes restrictions of *31 U.S.C. § 1301(a)* and the Antideficiency Act, *31 U.S.C. § 1341(a)*, it is our conclusion that expenses for training Honduran forces, and for the provision of civic and humanitarian assistance, have been charged to DOD's O&M funds in violation of *31 U.S.C. § 1301(a)*. We cannot make a similar determination with regard to DOD's use of O&M funds to finance exercise construction activities, as such funds may properly have been used under authority of *10 U.S.C. § 2805(c)* (minor military construction projects under \$200,000). By letter of today's date, however, we are requesting DOD to reexamine its accounting for construction expenses to verify that the conditions of *10 U.S.C. 2805(c)* have been met.

To the extent that that authority was exceeded, use of O&M funds for construction activities violated *31 U.S.C. § 1301(a)*. n1

n1 Costs of several construction projects in Honduras have been reported elsewhere as being in excess of \$200,000. See, e.g., our report GAO/C-NSIAD-84-8, March 6, 1984, App. II, p. 57. The accounting method used to calculate such costs, however, may differ from that used under *10 U.S.C. § 2805(c)*. See, e.g., DOD Directive 7040.2, January 18, 1961, as amended March 5, 1964, at p. 6 (funded project costs exclude military labor). [*4]

Although *31 U.S.C. § 1301(a)* does not specify the consequences (or remedies) for its violation, it is clear that such an expenditure is subject to disallowance by this Office. See *32 Comp. Gen. 71 (1952)*. In actual practice, GAO's treatment of such violations has varied. See *36 Comp. Gen. 386 (1956)*, *17 Comp. Gen. 1020 (1938)* (admonishing agency to discontinue the improper practice); *14 Comp. Gen. 103 (1934)* (adjustment of accounts); *17 Comp. Gen. 748 (1938)* (taking exception to applicable account). In the present case, it is our view that reimbursement should be made to the applicable O&M appropriation, where funds remain available, from the appropriations that we have identified to be the proper funding sources (i.e., security assistance funds for training of Honduran forces, foreign aid funds for civic/humanitarian assistance activities, and, to the extent that O&M funds were not available under *10 U.S.C. § 2805(c)*, military construction funds for exercise-related construction).

Where adjustment of accounts is not possible (i.e. because alternate funding sources are already obligated), expenditures improperly charged by DOD to O&M appropriations were made in violation [*5] of the Antideficiency Act, *31 U.S.C. § 1341(a)*. Not every violation of *31 U.S.C. § 1301(a)* also constitutes a violation of the Antideficiency Act. See B-208697, September 28, 1983. Even though an expenditure may have been charged to an improper source, the Antideficiency Act's prohibition against incurring obligations in excess or in advance of available appropriations is not also violated unless no other funds were available for that expenditure. Where, however, no other funds were authorized to be used for the purpose in question (or where those authorized were already obligated), both *31 U.S.C. § 1301(a)* and *§ 1341(a)* have been violated. In addition, we would consider an Antideficiency Act violation to have occurred where an expenditure was improperly charged and the appropriate fund source, although available at the time, was subsequently obligated, making readjustment of accounts impossible.

As the above indicates, a final determination as to whether DOD's activities in Honduras violated the Antideficiency Act depends upon the availability of alternate funding sources. After-the-fact determinations as to available alternate funding, however, are more properly the responsibility [*6] of DOD. We are therefore transmitting to DOD our attached analysis of the funding of combined exercises in Honduras, with a request that DOD make funding adjustments, where feasible, and, where not feasible, report Antideficiency Act violations and take appropriate administrative action under *31 U.S.C. § 1349*.

Funding adjustments made by DOD in light of our conclusions here must, of course, be consistent with the ordinary rules governing the use of appropriated funds, including fiscal year limitations. The latter requirement is particularly important with respect to adjustments in the present case because some of the exercise activities that we have addressed took place in the previous fiscal year. Unless funds remain available from that previous fiscal year (most likely, unexpended multiple-year authority), adjustment of accounts may be impossible. Security assistance funds, for example, are generally available only for one fiscal year. See, e.g., Further Continuing Appropriations Resolution, 1984, Pub. L. No. 98-151, § 101(b)(1), 97 Stat. 964, 966 (1983). Thus, new security assistance agreements, which must be funded with current-year appropriations, could not be [*7] used to "cure" funding violations with respect to obligations incurred in the previous fiscal year.

We are also recommending to DOD that it examine its funding of current activities in Honduras under the present exercises (Grenadero I) in light of this decision, and make funding adjustments as required. Finally, as we have under similar circumstances where DOD has incurred obligations in excess of its authority, we are recommending to DOD that it seek specific funding authorization from the Congress if it wishes to continue performing such a wide variety of activities under the aegis of an O&M-funded exercise. Compare *62 Comp. Gen. 323 (1983)*.

We hope that the above, and our analysis under separate cover, is of assistance to you.

(This unclassified appendix is provided in lieu of an appendix containing classified national security information.)

Appendix to Comptroller General Decision B-213137, June 22, 1984

Funding of Joint Combined Military Exercises in Honduras

Contents

| | |
|------------------------------------------|----|
| I. BACKGROUND | 1 |
| II. DISCUSSION | 2 |
| A. Ahuas Tara II Construction Activities | 4 |
| 1. Facts | 4 |
| 2. Analysis | 8 |
| 3. Conclusion | 15 |
| B. Radar Facilities | 16 |
| C. Training | 18 |
| D. Civic/Humanitarian Assistance | 22 |
| III. SUMMARY | 26 |

[*8]

I. BACKGROUND

On August 3, 1983, the Defense Department commenced Ahuas Tara (Big Pine) II, the second in a recent series of joint combined military exercises in Honduras. n1 During the exercise, which lasted until February 8, 1984, some 12,000 American troops participated in joint maneuvers with members of the Honduran military. In addition, over the 6 month course of the exercise, participating American units constructed one 3500-foot dirt assault (or "hasty") airstrip, expended one 4300-foot dirt airstrip to 8000 feet, expanded a 3000-foot asphalt airstrip to 3500 feet, installed or constructed nearly 300 wooden huts to serve as barracks, dining, and administrative facilities, deployed two radar systems, provided medical assistance to nearly 50,000 Honduran civilian patients, provided veterinary services to approximately 40,000 animals, built a school, and provided artillery, infantry, and medical training to hundreds of Honduran military personnel. These numerous activities, all carried out as a part of Ahuas Tara II, have raised questions, both within DOD and in the Congress, as to the scope of the authority under which such activities take place. This decision is intended [*9] to resolve some of these questions.

n1 The first exercise, Ahuas Tara I, took place during three weeks in January and February of 1983 and involved activities by some 1,600 U.S. troops. The current exercise, Grenadero I, began on April 1, 1984, will continue through the summer, and will involve the deployment of over 3,500 U.S. troops.

In connection with our investigation of DOD's activities in Honduras, we requested, on November 28, 1983, that DOD provide us with an explanation of funding sources used for each of 7 categories of Ahuas Tara II activities, authority for such use of funds, permanency of facilities, and, where appropriate, existence of reimbursement agreements. A related letter, sent on December 1, 1983, asked DOD to explain its authority to conduct humanitarian/civic activities in Central America.

DOD's detailed response, dated March 8, 1984, identified the O&M appropriations of the participating military departments as the funding source of most of the activities about which we had inquired. n2 The Department justified all "engineering work," civic action, radar installations, etc., as incidental to the exercise program. According to DOD, no formal training [*10] of Honduran troops took place, and any support services provided to Honduran soldiers would have been incurred in the absence of Honduran participation. DOD also described all exercise construction projects as temporary in nature. Finally, DOD stated that reimbursement agreements for any of its exercise activities were unnecessary as "all O&M funds usage is considered correct and proper." In its separate response to our question concerning its authority to carry out humanitarian assistance, however, DOD's General Counsel stated that "DOD has no separate statutory authority to perform humanitarian or civic action programs [except] under the authority of the Economy Act or other similar authority * * *." The apparent conflict between these statements was not explained.

n2 According to DOD, it is standard practice in joint exercise programs for the costs of exercise activities for each military service to be funded from the O&M appropriation of that service (other than airlift, sealift, inland transportation and port handling costs, paid from O&M funds available to the Joint Chiefs of Staff (JCS)). Thus, airstrip construction by Seabees is charged to Navy O&M, and that by Army engineers is charged to Army O&M. DOD has stated that O&M appropriations of the Army, Air Force, Navy, and Marine Corps were each used to finance activities of Ahuas Tara II. [*11]

In addition to DOD's formal comments to us, we have also reviewed an Army Judge Advocate General (JAG) staff analysis of exercise activities in Honduras, prepared during the planning stage of Ahuas Tara II. That analysis, transmitted to the U.S. Southern Command (SOUTHCOM, the command responsible for planning and carrying out the exercises), as the U.S. Army position,

[deleted]

DOD's formal comments and the Army JAG's analysis will be addressed at further length where relevant to the discussion that follows.

II. DISCUSSION

Operations and maintenance appropriations are typically provided for "expenses, not otherwise provided for, necessary for the operation and maintenance of" the applicable service or agency. See, e.g., Department of Defense Appropriation Act, 1984, Pub. L. No. 98-212, 97 Stat. 1421, 1423 (1983). This particular category of appropriations has been described as a "murky world which does not easily lend itself to clearcut conclusions." Hearings on TAKX Pre-Positioning Ship Program, before the Subcommittee on Readiness, House Committee on Armed Services, 97th Cong., 2d Sess. 2 (1982) (statement of Chairman Daniel). Because they are used for such a wide [*12] variety of activities in support of the operation of each military department, and because they are not subject to the same line-item scrutiny as are other types of appropriations, DOD's O&M funds are considered by many to be more discretionary than other types of defense appropriations. See *id.* The Department of Defense, however, clearly does not have unlimited discretion in determining which activities may be financed with O&M funds.

This Office has identified three factors to be considered in determining whether a certain expense is necessary or incidental to the proper execution of the object of an appropriation (here, those expenses necessary for the operation and maintenance of the various military departments). First and foremost, the expenditure must be reasonably related to the purposes for which the appropriation was made. See 42 *Comp. Gen.* 226, 228 (1962). Second, the expenditure must not be prohibited by law. 38 *Comp. Gen.* 782, 785 (1959). Finally, the expenditure must not fall specifically within the scope of some other category of appropriations. *Id.* This last requirement applies even if the more appropriate funding source is exhausted and therefore [*13] unavailable. B-139510, May 13, 1959.

Case-by-case decisions as to which appropriation may be used for a particular expenditure are left to the agency involved and, so long as such determinations are made in general conformity with the above three rules, they have not been generally questioned by this Office. See 18 *Comp. Gen.* 298, 292 (1938). In certain cases, either of two appropriations may reasonably be construed as available for an expenditure not specifically mentioned under either appropriation. In such cases, it is within the discretion of the agency to determine which appropriation is to be used for the activity in question, although once the determination has been made, it cannot later be changed. See, e.g., 59 *Comp. Gen.* 518 (1980).

The following discussion constitutes a review, in light of the factors discussed above, of each category of O&M-funded activities carried out by DOD in Honduras under the Ahuas Tara II joint combined exercise.

A. Ahuas Tara II Construction Activities

1. Facts: As described in our February 8, 1984 briefing to Representative Alexander, Ahuas Tara II construction activities centered around the establishment of four base [*14] camps, designed to house and/or support approximately 3,000 U.S. troops. Base camps were constructed at the following locations:

Palmerola/Comayagua. Exercise O&M funds were used to construct Joint Task Force-11 (JTF) headquarters at Palmerola Air Base near the central Honduran town of Comayagua. The camp was also the site of a mobile field hospital, aviation battalion, and support group. Army engineers and line troops constructed 132 "Central American Tropical" (CAT) huts n3 (or their equivalent) to serve as barracks, offices, a post exchange, mess halls, and latrines. Part of the camp was tied into public electrical and sewage systems. Army engineers also constructed an unpaved road network, unspecified vertical security structures, and fuel storage berms.

n3 CAT huts are 16 foot by 32 foot wooden structures with corrugated tin roofs, built from locally-purchased materials.

According to DOD's March 8, 1984, comments to us, the Palmerola camp was specifically intended to be used after completion of the Ahuas Tara II exercises. It has in fact continued in use as command headquarters for later combined exercises,

[deleted]

The exercise-constructed camp at Palmerola [*15] has become an integral part of the air base at the same location. The air base at Palmerola is a separate \$13 million military construction project approved by the Congress in 1982. The completed facility, as currently proposed by DOD, will include a 8000-foot jet-capable airfield and parking apron, and (as separately-funded projects) air munitions storage facilities, and a "semipermanent" operations facility (including living quarters for 100 men). A similar project (\$8 million in military construction funds) was approved for La Cieba Air Base in northern Honduras, although in 1983 the Congress prohibited DOD from obligating funds for that project pending the provision of an overall military construction plan for the region. See: Pub. L. No. 98-116, 97 Stat. 795, 796 (1983).

Trujillo/Puerto Castilla: The second base camp was constructed near Trujillo, several miles south of the northern Honduran port of Puerto Castilla, and about 10 miles west of the Regional Military Training Camp (RMTC), a security assistance-funded project presently used for formal training of Honduran and Salvadoran troops. Near Trujillo, Navy Seabees constructed "Camp Sea Eagle," a complex of barracks, [*16] offices and messhalls built from 40 "South East Asia" (SEA) huts. n4 Camp Sea Eagle was used to house the 3/319 Infantry Battalion, which participated in filed artillery exercises in the area. Seabees also constructed a 16-hut encampment nearby for their own use. n5

n4 SEA huts are 16 foot by 48 foot wooden structures, built from pre-cut materials brought from the U.S.

n5 Camp Sea Eagle was inadvertently built in a swamp, which flooded during the exercise period, causing some huts to be damaged. At one time the Honduran government was considering purchasing the facility for 10 percent of the cost of materials; we understand AID is currently considering acquiring the structures for use in other parts of Honduras.

About a mile from Camp Sea Eagle, Seabees helped to extend an existing asphalt airstrip from C-47 to C-130-capable length (from 3000 feet to 3500 feet). Seabee engineers performed grading and filling, and supervised paving operations performed by a Honduran firm. The paving contract cost about \$120,000, charged to exercise O&M funds. According to DOD, C-130 use of the airstrip has left the surface "rutted and cracked," to an extent that it will soon be unusable. [*17] Honduras has sought compensation from DOD for repair of the damage.

In addition to camp and airstrip facilities at Trujillo, Navy Seabees constructed a "soil-cement" helicopter pad and concrete port off-loading ramp at Puerto Castilla, and built more than 5 miles of roads in the vicinity.

[deleted]

At or near the RMTC security assistance project, Seabees constructed guard towers and roads, dug wells, repaired culverts, and constructed 10 CAT huts. An additional 17 CAT huts, also financed with exercise O&M funds, were constructed at the RMTC by Honduran troops, who had received instruction from Navy Seabees. According to DOD's March 8, 1984 comments, the CAT huts at the RMTC were constructed to house members of the 3/319 Artillery Battalion moved due to flooding at Camp Sea Eagle. Our own investigation showed, however, that huts were not used by members of that battalion, but were used to house Honduran RMTC security guards immediately upon construction.

Although improvements constructed in the Trujillo/Puerto Castilla area were used extensively during Ahuas Tara II, it is clear that a more extended use was also contemplated by DOD. For example, the exercise plan for Ahuas [*18] Tara II proposed the expansion of the Trujillo airfield

[deleted]

U.S. Southern Command, Joint Task Force-11, Ahuas Tara II Exercise Plan (draft), August 3, 1983, p.3 (emphasis added). In addition, Army officials have stated that the Trujillo airfield was extended specifically to support the nearby RMTC.

As of April 1984, the airstrip at Trujillo, although damaged, was still C-130 capable.

Aguacate: A third base camp was constructed by engineers of the 46th Army Engineering Battalion at Aguacate in eastern Honduras. The camp included an airfield facility/and 8 CAT huts (or their equivalent), used as dining, and administrative buildings. Engineers also installed a piped water system for the camp, consisting of over 13,000 feet of 3 inch pipe.

The airfield at Aguacate was 4300 feet in length prior to the commencement of Ahuas Tara II, and was thus already capable of handling the largest aircraft used in-country during the exercise, the C-130 transport (which requires a 3500-foot runway). Army engineers, however, expanded the runway to 8000-feet and upgraded it with 30,000 cubic yards of local gravel. Construction also involved installation of cement drainage culverts, [*19] which, according to DOD, have been paid for by the Honduran government. Once paved, as apparently is planned by Honduras, the facility will be able to accommodate

[deleted]

The airfield at Aguacate was used as a take-off point for two exercise events during Ahuas Tara II. According to DOD's March 8, 1984 comments, expansion of the airfield was necessary to accomodate parking for "transient aircraft" during the exercise, and was done in lieu of constructing a parking apron. DOD states that the airfield expansion was thus intended to fulfill exercise requirements. In addition, DOD notes that construction activities at Aguacate corresponded to DOD-established training requirements for participating combat engineers. While its justification for airfield construction at Aguacate is founded on these exercise and training benefits, DOD does acknowledge that its construction activities contributed to a "longstanding" plan by the Honduran Armed Forces to make the Aguacate airfield usable for forward-basing of Honduran

[deleted]

aircraft.

Ahuas Tara II planning documents show construction at Aguacate to have been conducted as part of an exercise activity to

[deleted]

See [*20] Cable from JCS, Washington, to U.S. Commanders-in-Chief, July 19, 1983. According to an August 10, 1983, cable from the U.S. Southern Command,

[deleted]

As of April 1984, the airfield at Aguacate was still C-130 capable. Buildings were occupied by Honduran military personnel.

San Lorenzo/Choluteca: The fourth base camp constructed during Ahuas Tara II was at the southern port town of San Lorenzo. San Lorenzo was the headquarters of the 46th Army Engineering Battalion, as well as base for about 120 Special Forces personnel. The camp consisted of a C-130-capable dirt airstrip (expanded from an existing facility), and 94 CAT huts used for barracks, administrative facilities and mess halls. Other construction in the area included road-building and ammunition shelters. In addition, as part of anti-armor exercises, the 46th Engineers constructed 11 miles of earthen tank traps near Choluteca, just east of San Lorenzo. The Southern Command had initially planned to construct concrete tank traps in the Choluteca region, but amended its plans after Army JAG lawyers indicated that concrete structures would have to be military construction- or security assistance-funded.

Although [*21] facilities constructed at San Lorenzo were given substantial use during Ahuas Tara II, exercise planning documents show that the fulfillment of exercise requirements was not the only purpose for such construction. The original exercise plan for Ahuas Tara II contained the following background information:

[deleted]

Ahuas Tara II Exercise Plan (draft), *supra*, p. 2 (emphasis added).

The exercise plan further explains that

[deleted]

Id. The exercise plan specifically included, in support of an anti-armor field training exercise in the Choluteca area, the construction of a 3500-foot C-130 capable airstrip at nearby San Lorenzo, thus fulfilling the need specified by the Honduran General Staff.

The airfield facility at San Lorenzo was also used by U.S. troops during post-Ahuas Tara II exercises in March and has been used to support the current Grenadero I exercises.

As of April 1984, the airfield at San Lorenzo was still C-130 capable, and had been regraded by Honduran forces. We have been informed that the camp, although unoccupied, is in good condition. According to a Defense Property Disposal Office official in Panama, huts at San Lorenzo will be sold to the Honduran [*22] government for 20 percent of cost. Some huts, in the meantime, have been used by U.S. Army Engineers during the current (Grenadero I) exercise.

2. Analysis: Construction activities during the course of Ahuas Tara II were charged to O&M appropriations as operational expenses of the exercise. Although *10 U.S.C. § 2805(c)* (1982) provides separate authority for financing a minor military construction project with up to \$200,000 of O&M funds, this authority was apparently not the basis for DOD's use of O&M funds for its construction activities in Honduras. Consequently, the principal question to be addressed here is whether DOD has authority apart from *10 U.S.C. § 2805(c)* to use O&M funds for its construction activities in Honduras.

It is a basic premise in appropriations law that expenses which are not necessary to carry out the purposes of a particular appropriation may not be funded from that source. As indicated previously, there are three factors to consider in applying the necessary expense rule: whether the expenditure reasonably relates to the object of the appropriation, whether it is otherwise prohibited by law, and whether it falls within the scope of another appropriation. [*23] See p. 3 *supra*.

Because military construction activities are generally performed in furtherance of specific operational requirements of the various military departments, we do not question whether expenditures for such activities are "reasonably related" to the purposes of O&M appropriations, the first of the three factors discussed above. Nonetheless, it is clear, based upon the two remaining factors, that O&M funds are not generally available for military construction activities, first because of a specific statutory prohibition contained in *41 U.S.C. § 12* (1982), and second because specific appropriations are made by the Congress for such purposes.

Section 3733 of the Revised Statutes, codified to *41 U.S.C. § 12*, provides:

"No contract shall be entered into for the erection, repair, or furnishing of any public building, or for any public improvement which shall bind the Government to pay a larger sum of money than the amount in the Treasury appropriated for the specific purpose."

This provision is applicable to all executive departments, including the Department of Defense. *Sutton v. United States*, 256 U.S. 575, 579 (1921). It has been interpreted by this Office [*24] to require that funding for DOD construction projects be specifically authorized by the Congress; other, more general, appropriations are not ordinarily available for such projects. See *42 Comp. Gen. 212, 214-15* (1962); B-165289-O.M., October 22, 1968.

In addition to the restrictive statutory language of *41 U.S.C. § 12*, such activities fall clearly within the scope of appropriations provided by the Congress for those purposes. Where construction is carried out for the use of a military department or defense agency, funding is provided under annual military construction appropriation acts, which typically provide funds to each military department or agency for:

"acquisition, construction, installation and equipment of temporary or permanent public works, military installations, facilities and real property * * *." See Military Construction Appropriation Act, 1984, Pub. L. No. 98-116, 97 Stat. 795 (1983).

Where such activities are conducted for the benefit of a foreign nation, funding is ordinarily provided under annual security assistance appropriations, such as those "for necessary expenses to carry out section 23 and 24 of the Arms Export Control Act." See Further [*25] Continuing Appropriations Resolution, 1984, Pub. L. No. 98-151, § 101(b)(1), 97 Stat. 964, 966 (1983). Sections 23 and 24 of the Arms Export Control Act authorize the President to finance the procurement by foreign countries of, inter alia, military "design and construction services." *22 U.S.C. § 2763-64* (1982). See also *22 U.S.C. § 2769* (1982), relating to Foreign Military Construction Sales.

Based, therefore, on the statutory prohibition of *41 U.S.C. § 12*, as well as on the existence of other more specific appropriation categories, we conclude that military construction activities, except as specifically permitted under *10 U.S.C. § 2805(c)*, may not be financed from general appropriation categories such as O&M. This Office has reached the same conclusion in previous cases. For example, in a 1961 report on DOD's misuse of O&M funds for military construction activities, we stated:

"Ordinarily, because of the restrictions in section 3678, Revised Statutes (*31 U.S.C. § 628*) [now codified to *31 U.S.C. § 1301(a)*], and section 3733, Revised Statutes (*41 U.S.C. § 12*), use of operation and maintenance funds to finance construction or construction-type projects, constituting [*26] public improvements under section 3733, would have to be specifically authorized unless [under the predecessor to *10 U.S.C. § 2805(c)*] the projects were urgently needed and did not exceed \$25,000." B-133316, January 24, 1961 (airfield construction at Ft. Lee, Virginia, and other unauthorized construction).

Having stated our opinion that military construction activities, as a general rule, must be financed from funds specifically appropriated therefor, it is necessary to determine whether that rule applies to the present case. In its March 8, 1984 response to our request for comments, DOD justified its use of O&M funding of exercise construction activities on three grounds: the temporary nature of the facilities constructed, the fact that facilities constructed were used to fulfill various exercise needs, and the training benefit to engineers involved in the construction. The last two factors relate to whether the activities in question have a readiness or operational benefit, an aspect of construction that we have already acknowledged, but which does not eliminate ordinary military construction funding requirements. n6 The first factor, however, is one that may in fact be determinative [*27] in the present case. Although military construction appropriations are provided for both "temporary and permanent" facilities (see Military Construction Appropriation Act, 1984, *supra*, p. 10), both DOD regulations and the decisions of this Office recognize that certain types of temporary structures or facilities need not be considered to be public works for purposes of determining proper funding sources for construction activities.

n6 For example, in its March 8, 1984 comments to us, DOD justified engineer construction activities at the Aguacate airfield on grounds that the project "enabled engineers to train on 84 Army Training Evaluation Program Tasks" by undergoing "training in construction management and equipment maintenance in [a] remote area for small field engineer elements." The Army Training and Evaluation Program (ARTEP) is a battalion-specific "reference document" for trainers and training managers, specifying training objectives and guidance. As DOD stated, the Engineer Combat Battalion (Heavy) ARTEP specifically includes as an assigned battalion task (at the company level) the construction of forward tactical landing strips. Nonetheless, in our view, the fact that an engineering unit performs tasks listed in the ARTEP does not mean that the performance of such activities may automatically be charged to O&M training or exercise funds. If DOD were to use Army engineering units to construct a new Honduran port complex, including administrative and storage buildings, piers, fuel storage tanks and pipelines, together with an associated all-weather airfield (all corresponding to ARTEP tasks), it is clear that military construction or security assistance funds would have to be used, no matter how beneficial the work would be from a training viewpoint. Compare Army Regulation (AR) 415-32, June 23, 1967, which provides guidelines covering the proficiency training of Army Engineer construction units through assignment to established military construction-funded projects. [*28]

Defense Department regulations define three categories of permanency of construction: "permanent" (expected to last more than 25 years), "semi-permanent" (to last from 5 to 25 years), and "temporary" (to last less than 5 years). See DOD Instruction 4164.14, December 21, 1966. Army regulations governing the conduct of joint exercises provide guidance as to which activities are properly chargeable to O&M exercise funds. See Army Regulation (AR) 350-28, App. J, December 15, 1983 (replacing AR 220-55, P23, July 1, 1978). These regulations provide the following example of obligations not properly chargeable to Army exercise O&M funds:

"Permanent or semipermanent construction. Costs of certain minor and temporary construction required for an exercise may be charged under special circumstances when authorized by the exercise directive. (An example is temporary latrines.)" AR 350-28, App. J-2(k), December 15, 1983.

The regulation clearly does not specify that all temporary construction may be charged to exercise O&M funds, although this appears to be the interpretation made by those officials responsible for carrying out Ahuas Tara II. The sole reference to "temporary [*29] latrines" in AR 350-28 is in sharp contrast to barracks and support structures for

3000 troops, construction or expansion of three airfields, and other miscellaneous construction activities carried out under Ahuas Tara II and funded with exercise O&M appropriations.

The decisions of this Office also indicate that the "temporary structure" exception to ordinary military construction funding requirements is extremely limited in scope. In *42 Comp. Gen. 212 (1962)*, the Comptroller General addressed the question of whether funds appropriated to the Department of Defense (from property-disposal proceeds) for the operation of DOD's property-disposal program could be used to pay for minor temporary construction ("transitory shelters, concrete segregation bins and other work") in connection with that program. The Comptroller General held that construction of the facilities in question could not be funded as operational expenses of the program, based upon the requirement of *41 U.S.C. § 12* that construction of public improvements be authorized by specific appropriations. *42 Comp. Gen. 215*.

In interpreting *41 U.S.C. § 12*, the Comptroller General stated:

"The terms 'public building' and [*30] 'public improvements' as used in the foregoing statute likewise have been the subject of numerous decisions of the accounting officers over a long period of time. The decisions uniformly have been to the effect that any structure in the form of a building not clearly of a temporary character is such a public building or public improvement, the expenditures for which must be authorized by specific appropriations. Also, such structures as temporary sheds for the shelter of farm animals; portable houses for temporary use of employees; temporary portable buildings for use in the detention and treatment of aliens; barns, sheds, cottages, etc., of frame construction of a temporary nature with dirt floors and contemplated to be destroyed; hangars, shops and storehouses; and quonset huts, have been considered as being such public buildings or public improvements. Minor structures clearly of a temporary nature and intended to be used for only a temporary period have been held not to be public buildings or public improvements (*26 Comp. Dec. 829*), but the structures and improvements involved generally in your disposal program are clearly not of this nature. The mere fact that the [*31] buildings are prefabricated, movable, and accounted for as personal property, in itself, is immaterial as to whether they are public buildings or public improvements within the contemplation of section 3733, Revised Statutes. It is common practice today to construct both temporary and permanent structures with prefabricated material which may be dismantled and moved, but the structures are nevertheless public buildings or public improvements." *42 Comp. Gen. at 214-215*. (Citations omitted and emphasis added.)

See also *30 Comp. Gen. 487 (1951)* (Quonset huts); *6 Comp. Gen. 619 (1927)* (frame shed). Although these and other cases involve only the construction of vertical structures, we believe that the same principles may be considered to apply to other types of public improvements as well, including roads and airstrips. Those principles, applied to the present case, prohibit the funding of exercise-related construction not "clearly of a temporary nature" as operational expenses of the exercise program. Such expenses must be financed separately as construction.

DOD has stated its view that all facilities constructed during Ahuas Tara II were temporary in nature, and, as [*32] evidence of this, has cited deterioration of Camp Sea Eagle, near Trujillo. As we noted previously, however, that facility was inadvertently constructed in a swamp and we do not consider it to be at all typical of those facilities built during the exercises. On the contrary, our own investigations (as recently as late April 1984) show that the majority of these facilities remain in good condition, and in fact continue to be used, both by U.S. and Honduran personnel. Although DOD's March 8, 1984 comments to us state that airfields and facilities "will deteriorate if not maintained" and that "Hondurans do not have resources to maintain," U.S. Army engineers in Honduras informed GAO auditors that airfields could be used indefinitely with a minor amount of maintenance. Facilities remaining in U.S. custody continue to be maintained by the U.S. military; those under Honduran control, we have observed, are being maintained by the Hondurans. In addition, as described previously, planning documents for the exercise clearly indicate DOD's intention that

[deleted]

It is apparent to us that the majority of facilities constructed during Ahuas Tara II are substantially less "temporary" than [*33] many of those which we described in *42 Comp. Gen. 212* as requiring specific funding as public improvements. See *42 Comp. Gen. 212, 214 (1962)*. Consequently, it is our view that the majority of construction activities could not be funded out of O&M as ordinary operational expenses of the joint exercises.

This conclusion does not resolve the question of what appropriation sources could properly have been used for exercise construction activities. In our view, DOD could have chosen from one of several funding sources. We stated previously that two principal categories of appropriations are specifically provided by the Congress for military

construction activities. When construction relates to facilities intended for use by a defense agency or military department, funds are ordinarily provided in the annual military construction acts; when facilities are provided for the benefit of a foreign government, construction is ordinarily provided through security assistance programs (such as the Foreign Military Construction Sales Program).

The 4 base camps and associated facilities constructed during Ahuas Tara II were used by U.S. forces during those exercises and, to a large degree, [*34] after their conclusion.

[deleted]

In light of the

[deleted]

Ahuas Tara II construction, it is our conclusion that most construction activities could properly have been financed by DOD as either military construction or security assistance: this Office would not have objected to DOD's selection of either category for any particular project. See *59 Comp. Gen. 518 (1980)*.

As indicated earlier, our discussion here has concerned DOD's authority to charge construction costs to O&M appropriations apart from the authority provided under *10 U.S.C. § 2805(c)*. Where DOD has charged construction expenses in Honduras to O&M as operational costs of Ahuas Tara II, we would not object to those obligations (so long as they did not exceed \$200,000 per project) because they could properly have been charged to O&M as minor military construction costs under *10 U.S.C. § 2805(c)*. To the extent, however, that DOD has charged its O&M appropriations with the costs of any individual construction project in Honduras in excess of \$200,000, the excess charge was made in violation of the purposes-restriction of *31 U.S.C. § 1301(a)*. When adjusting its accounts to remedy any overcharge, O&M appropriations [*35] may be reimbursed from any military construction funds available for such readjustment (and which were available at the time of the original obligation). Alternatively,

[deleted]

in adjusting its accounts, charge the entire construction cost component of any particular project to security assistance funds (again, subject to ordinary availability requirements). n7 If neither of these two adjustment alternatives are available, DOD should report excess charges to O&M as having been made in violation of the Antideficiency Act, *31 U.S.C. § 1341(a)*.

n7 DOD does not, however, have the option of charging project costs up to \$200,000 to O&M under *10 U.S.C. § 2805(c)* and charging costs in excess of \$200,000 to security assistance funds, as it must elect between financing a project as security assistance or as military construction. See *59 Comp. Gen. 518 (1980)*.

3. Conclusion: Apart from the specific statutory authority of *10 U.S.C. § 2805(c)*, DOD has no general authority to charge costs of construction activities to O&M appropriations. To the extent, therefore, that O&M funding was not available under *10 U.S.C. § 2805(c)*, exercise construction expenses charged to O&M were [*36] made in violation of *31 U.S.C. § 1301(a)*, which prohibits the application of appropriations to objects other than those for which they were made. In addition, to the extent that § 2805(c) funding was unavailable and alternate funding (either military construction or security assistance) was also unavailable, exercise construction projects charged to O&M were in violation of the Antideficiency Act, *31 U.S.C. § 1341(a)*, which prohibits the incurring of obligations in excess of or advance of available appropriations.

DOD, in light of our conclusions here, should make adjustments, where feasible, to those appropriation accounts to which construction activities during Ahuas Tara II were charged; where adjustments are not feasible, DOD should report such obligations as being in violation of the Antideficiency Act.

B. Radar Facilities

The Defense Department has established two radar installations in Honduras, each originally deployed as part of joint combined exercises, but used extensively (both during and after exercises) for general support to both U.S. and Honduran military

[deleted]

activities. All costs pertaining to these two radar systems have been paid from O&M funds. [*37]

In August of 1982, in response to a Honduran government request for U.S. assistance, the Secretary of Defense directed the Joint Chiefs of Staff to assess Honduran radar requirements. In October of the same year, a JCS staff study concluded that

[deleted]

The TPS-43 radar system was initially installed at La Mesa Air Base, in western Honduras, during the Ahuas Tara I exercise in February 1983. After that exercise, the system was placed in storage (in Honduras) until May 1983, at which time it was installed in a facility at Cerro la Mole, in southern central Honduras. The system, manned by 65 U.S. Air Force personnel, provides tracking data to a Honduras Air Force Operations Center at Tegucigalpa. The site at Cerro la Mole was prepared by the Honduran military with some assistance from U.S. Troops. American units also installed trailers for living quarters.

A second radar system, a Marine Corps AN-TPS-63/65, was installed during August 1983 on Tiger Island, in the Bay of Fonseca. The Bay of Fonseca is located between El Salvador, Honduras, and Nicaragua, and has been cited as a major arms route between Nicaragua and Salvadoran insurgents. The installation, which supplements [*38] the one at Cerro la Mole, was manned and secured by about 100 U.S. Marines. Site preparation including construction of a small (C-7 capable) dirt airstrip, well-digging, and earthwork construction was performed by U.S. military personnel as part of the Ahuas Tara II exercise. Flight tracking data from Tiger Island were relayed to U.S. personnel at the Honduran Air Force Operations Center at Tegucigalpa. The Tiger Island installation finally closed down in May 1984.

[deleted]

There are two principal cost components relating to the two radar facilities in question: installation costs and operational costs. Installation costs for both radar systems were relatively minimal, generally because extensive facilities are not necessary for such installations, and because some construction services (particularly at Cerro la Mole and including clearing, roadbuilding, installation of power lines) were provided by the Honduran government (although with some U.S. assistance). Nonetheless, as with other facilities constructed or installed in Honduras either as part of joint exercises or for other purposes, construction costs incurred by DOD cannot be regarded as mere operational expenses unless [*39] the facilities involved are clearly of a temporary nature. See discussion *supra*, p. 13.

As with base camp construction in Honduras (including airstrips) it is not apparent to us that radar installations, when established by DOD, were "minor structures clearly of a temporary character" as that phrase is used in *42 Comp. Gen. 212 (1962)*. The Tiger Island facility, although in actuality only operational for eight months, had no specific removal date when originally deployed; it was used to provide tracking data well after completion of Ahuas Tara II. The Cerro la Mole facility, although deployed for only a two-year period (thus falling within the "temporary" facility category defined in DOD regulations) is certainly capable, if deployment is extended, of being used for a much longer period of time. Additionally, in our view neither of these facilities is a "minor" improvement comparable to those considered in our previous decisions. It is therefore our opinion that installation costs should either have been funded as military construction or security assistance. n8 At the same time, however, it is unlikely that installation and site preparation costs at either facility [*40] exceeded \$200,000, and it is probable that DOD could properly have financed installation costs with O&M funds as minor military construction under *10 U.S.C. § 2805(c)*. On this basis, we would not object to DOD's use of O&M funds for radar site preparation and installation expenses, although DOD should verify that conditions of *10 U.S.C. § 2805(c)* have been met.

n8 Like other facilities,

[deleted]

Because of this dual benefit, we would not object to DOD's choice of either funding method.

The second cost component associated with radar installations in Honduras relates to operational costs. These types of expenses make up the bulk of costs associated with the two radar installations. Because such costs clearly fall within the scope of O&M appropriations, use of such funds by DOD was proper.

One additional issue that has been raised, particularly in connection with radar installations, is the use of exercise personnel and funding for non-exercise projects. "Exercise" personnel were used for support of radar facilities in Honduras, including installation and operation of the TPS-43 during Ahuas Tara I, installation/operation of the TPS-63/65 at Tiger Island during and after [*41] Ahuas Tara II, and other general support (transportation, medical assistance) as needed at each facility. Through this assistance, "exercise" O&M funds were used to support radar facilities, even though such facilities were primarily used for non-exercise requirements.

No separate appropriation is made for "exercise" expenses; rather, such expenses are paid from lump-sum O&M appropriations made to each military department or defense agency. See footnote 2, *supra*, p. 2. Consequently, once the availability of O&M appropriations has been established for a particular purpose or activity, it is not legally significant (from a funding standpoint) whether the activity is performed by exercise personnel or by other DOD units. Thus, it is our view that, so long as O&M funding for radar facilities was authorized (both for operational expenses, and for installation expenses under 10 U.S.C. § 2805(c)), the use of exercise personnel and "exercise" O&M funding was permissible.

C. Training Activities

Accordingly to DOD's March 8, 1984 comments to us,

"[t]here was no formal training of Honduran troops as part of the exercise, however, the U.S. and Honduran forces participated [*42] in integrated exercises which included familiarization and safety orientation at no additional cost to the U.S."

This view differs significantly from our own observations, as described in our audit report GAO/C-NSIAD-84-8, March 6, 1984, and as discussed below.

During October 1983, a GAO field team in Honduras identified 3 types of training being conducted by U.S. forces as a part of the Ahuas Tara II joint combined exercises:

1. U.S. military personnel assigned to the 41st Combat Support Hospital at Comayagua/Palmerola provided three 5-week combat medic training courses for approximately 100 Hondurans. DOD later acknowledged that such classes took place, but stated that they were performed by off-duty U.S. volunteers, provided "humanitarian" medical instruction to Hondurans, and contributed to U.S. readiness by exposing U.S. personnel to "indigenous methods of operation and culture."
2. In Puerto Castilla, members of the 3/319th Field Artillery Battalion provided 3-4 weeks of instruction on 105 mm artillery to two Honduran artillery battalions prior to combined field training exercises. DOD describes the activity as a "22 day combined operations period" for interoperability [*43] and safety development, and states that each gun section had a U.S. and a Honduran section chief and integrated crew. Our personnel, however, observed gun crews of 8-12 Hondurans being supervised and instructed by teams of 2-4 U.S. servicemen, half of whom spoke Spanish. We were told that, about the time that these events took place, Honduras took delivery (under the Foreign Military Sales Program) of 105mm artillery, the first guns of this type in Honduras' arsenal. We were informed by personnel of the Military Assistance Group that, without training provided under the exercise, Honduras would had to purchase the services of U.S. Military training teams at a cost of from \$250,000 to \$500,000.
3. U.S. Special Forces personnel in San Lorenzo provided basic and/or advanced classroom and field training to four Honduran battalions, on mortars, fire-direction, and counterinsurgency tactics. This training was similar to that provided by security assistance-funded military training teams at the Regional Military Training Camp in Trujillo. DOD describes these activities as: joint review and practicing of tactics and techniques for interoperability, including some "minor individual [*44] remedial preparation" for safety and standardization.

Whenever combined military exercises are conducted, it is natural (and indeed desirable) that there be a transfer of information and skills between the armed forces of the participating countries. In addition, where there is a marked disparity of military sophistication between the two nations' armed forces, it is not surprising that this transfer is principally in one direction, i.e. to the benefit of the less-developed military force. In addition, as emphasized by the Defense Department, some degree of familiarization and safety instruction is necessary before combined-forces activities are undertaken, in order to ensure "interoperability" of the two forces.

At the same time, where familiarization and safety instruction prior to combined exercises rise to a level of formal training comparable to that normally provided by security assistance projects, it is our view that those activities fall

within the scope of security assistance, for which comprehensive legislative programs (and specific appropriation categories) have been established by the Congress. Where such extensive "interoperability" training is in fact necessary, [*45] combined exercises should not be conducted without the formal training needed to equalize the participating forces.

A view similar to that expressed above was put forth in an Army Judge Advocate General (JAG) staff review of the Ahuas Tara II exercise proposal. The JAG analysis emphasized that

[deleted]

In addition, previous guidance in this area was set out in a February 24, 1977 memorandum from the Department of Defense General Counsel. That memorandum stated that

[deleted]

Based upon our own observations of formal training provided to Honduras soldiers "in preparation for" exercise participation (and otherwise), the previous DOD guidance was disregarded by the U.S. Southern Command in its execution of Ahuas Tara II. Training provided to Honduran troops during the exercise, although certainly related to exercise activities, was essentially the same as that ordinarily provided through security assistance, and consequently should have been funded as such: security assistance funds are specifically provided by the Congress to be used to train the military forces of friendly foreign governments, including formal or informal instruction provided as part of training exercises. [*46] See, e.g., Further Continuing appropriations Resolution, 1984, Pub. L. No. 98-151, § 101(b)(1), 97 Stat. 964, 966 (1983), providing funds for fiscal year 1984 to carry out credit sales and guaranties for procurement of defense services by foreign countries, under sections 23 and 24 of the Arms Export Control Act, 22 U.S.C. § 2263-64; section 47 of that Act (22 U.S.C. § 2794) defines "defense services" to include all types of military training.

The Defense Department, in its March 8, 1984 letter, has put forward several justifications for its training of Honduran soldiers as part of exercise operations, in addition to the contribution to "interoperability." DOD emphasizes that training of Honduran troops contributes to the readiness of U.S. forces, by exercising the U.S. role of "force multiplier," by permitting U.S. troops to improve their professional skills in a bilingual environment, and by exposing U.S. forces to indigenous cultures. As we stated in connection with our examination of construction activities under Ahuas Tara II, however, the mere fact that an activity carried out by DOD has a readiness or operational benefit does not mean that it may automatically be [*47] financed with O&M appropriations. We previously acknowledged that facilities constructed during the Honduran exercises contributed significantly to U.S. military readiness in the region, but concluded that they must be financed as military construction or security assistance. See p. 11, *supra*. The same is true in the case of training of foreign troops. The fact that such training has a concurrent benefit to the readiness of U.S. forces does not remove it from the scope of security assistance.

Regarding the provision of combat medic training to Honduran troops, DOD's March 8, 1984 comments to us imply that there are no funding problems in connection with these activities because they were "humanitarian" services performed by "off-duty" U.S. troops on a voluntary basis. We cannot agree. The activities that we observed constituted combat medical training of foreign troops, activities which we categorize as military training rather than civic or humanitarian assistance. We would also note that active duty military personnel, unless in an approved leave status, are considered as being "on-duty" at all times. See B-203251, December 15, 1981. Although an active-duty [*48] member may, when not scheduled to perform official duties, engage in activities that are not inconsistent with his military status, it is our view that the provision of military training to foreign troops constitutes a military function that should properly be considered as part of the official duties of that member, even if performed on a "voluntary" basis. DOD cannot discharge its responsibility to ensure proper funding of its activities by saying that they are performed by "off-duty volunteers."

We do not dispute the fact that the level of training provided to Honduran forces was generally necessary to prepare them for the exercise events in which they participated. It should, however, have been apparent to DOD at the time the exercises were planned that substantial training would be required for adequate Honduran participation: for example, DOD scheduled combined field artillery exercises using 105mm guns with Honduran soldiers who had never been trained on such weapons. In our opinion, DOD should have carried out exercise activities in coordination with a security assistance-funded training program, rather than treating training as an integral part of the exercise operation. [*49]

Based upon the foregoing, it is our opinion that the Department of Defense engaged in the training of foreign military forces during the course of the Ahuas Tara II exercises in Honduras, and should have financed such training as security assistance. To the extent that these activities were financed from O&M appropriations as exercised operational expenses, the Department violated 31 U.S.C. § 1301(a), which requires that funds be applied solely to the purposes for which they were appropriated. It is also possible that such activities were performed in violation of the Antideficiency Act. DOD should make a final determination in this regard based on the availability of alternate funding sources to make the improperly used account whole.

D. Civic and Humanitarian Assistance

The Defense Department has long carried out a wide variety of humanitarian assistance and civic action programs in Central America, both as a part of, and independent from, combined exercises such as Ahuas Tara II. In some cases, assistance has been provided through written agreements with the Agency for International Development (AID) under authority of the Economy Act, 31 U.S.C. § 1535. In other cases, [*50] however, U.S. forces have carried out humanitarian and civic action activities without reimbursement from AID or the host-country.

During Ahuas Tara II, civic action and humanitarian assistance activities took place on an almost-daily basis. According to DOD, personnel of the 41st Combat Support Hospital conducted MEDCAP's (Medical Civil Action Programs) throughout Honduras over the course of the exercises, resulting in the treatment of over 46,000 Honduran civilian medical patients, 7,000 dental patients, 100,000 immunizations, and the treatment, under a veterinary program, of more than 37,000 animals. Medicines utilized for these activities were taken from U.S. government supplies nearing the end of their shelf-life, or were donated (by the Honduran government or charitable organizations). In addition to this comprehensive medical aid, U.S. forces transported U.S.-donated medical supplies, clothing, and food to various locations in Honduras. In one case, a team of 15-20 Navy Seabees constructed a 20 foot-by-80 foot school-house at the village of Punta Piedra, using AID-supplied materials.

Notwithstanding the broad range and scope of humanitarian and civic action activities [*51] recently carried out by DOD in Central America, there appears to be some question within DOD itself as to the authority for such activities. At the time that the Ahuas Tara II exercise was being planned, the Army JAG staff review of the exercise proposal

[deleted]

The JAG view also appears to reflect that of DOD's General Counsel. On December 1, 1983, we requested DOD to provide us with an explanation of its authority to conduct humanitarian or civic action programs in Central America. The response, from DOD's General Counsel, was that DOD has no separate statutory authority to carry out such activities, but could so on a reimbursable basis on behalf of the Department of State or AID "under the authority of the Economy Act or other similar authority." In response, however, to our separate request to DOD for a description of reimbursement agreements or arrangements covering any or all of the wide range of Ahuas Tara II exercise civic/humanitarian activities, we were informed by the Assistant Secretary of Defense for International Security Affairs (in DOD's March 8, 1984 comments) that no such agreements existed. Although exercise personnel consulted with AID officials (and occasionally [*52] utilized AID-supplied provisions or materials, such as for the schoolhouse built at Punta Piedra), costs of carrying out civic/humanitarian activities were, on the whole, borne by DOD, and charged to exercise O&M funds.

The Department of Defense has recently started to reexamine in detail its conduct of civic/humanitarian activities. On January 12, 1984, Secretary Weinberger established a DOD "Task Force on Humanitarian Issues," to explore DOD's current authority in the area, to identify DOD requirements, and to determine if legislative or regulatory changes are necessary. In particular, the task force was to consider "[r]evising USC Title 10 to include 'humanitarian' missions within the definition of military missions * * * [to] enable DOD to use 'exercise' and Operations and Maintenance (O&M) funds for civic action and humanitarian efforts."

The task force was due to report on April 30, 1984, although we have not yet been provided details of its work.

We agree with DOD's General Counsel that the Department's authority to carry out civic/humanitarian activities is limited in scope. The principal authority, as noted by DOD, is through Economy Act transactions, i.e., under [*53] an order placed by another Federal agency (such as AID) ordinarily responsible for carrying out such activities. See 31 U.S.C. § 1535. Economy Act orders are placed on a reimbursable basis, and, when made, constitute an obligation of the ordering agency (charged to funds appropriated by the Congress to that agency--in this case, for example, AID).

Apart from the authority of the Economy Act, DOD may carry out civic action activities on a limited basis through its security assistance programs. Under section 502 of the Foreign Assistance Act of 1961, defense articles and services may be provided to a foreign country for, among other purposes:

"the purpose of assisting foreign military forces in less developed friendly countries (or the voluntary efforts of personnel of the Armed Forces of the United States in such countries) to construct public works and to engage in other activities helpful to the economic and social development of such friendly countries. It is the sense of the Congress that such foreign military forces should not be maintained or established solely for civic action activities and that such civic action activities not significantly detract from the capability [*54] of the military forces to perform their military missions and be coordinated with and form part of the total economic and social development effort." 22 U.S.C. § 2302 (1982).

Based upon this authority, DOD may, through the provision of defense articles and services to Honduras under security assistance programs, assist the Honduran government with civic projects and programs. The legislative history of this provision provides that:

"any civic action activity should be incidental to the performance of the usual duties of a military unit or a byproduct of the presence of such unit in a particular locality. The construction of a schoolhouse might qualify as well as a village access road, a small community sanitation project, or other activities that improve the relationship of the military to the local civilian population. The primary purposes of military assistance should be to meet military requirements. * * * The committee wants to make clear that civic action programs are to be neither extensive nor expensive." H.R. Rep. No. 321, 89th Cong. 1st, Sess. 26-27 (1965).

Similar authority is provided under section 4 of the Arms Export Control Act, 22 U.S.C. § 2754 (1982), in [*55] connection with Foreign Military Sales.

Based upon DOD's March 8, 1984 comments to us, it does not appear that civic/humanitarian activities under Ahuas Tara II were performed either under authority of the economy Act or as incidental to DOD's security assistance programs. Instead, DOD has justified such activities on the basis (1) that they were "ancillary" to exercise events, (2) that in some cases, they provided training to participating U.S. units, and (3) that they contributed to U.S. regional readiness by improving relations with friendly foreign nations and by creating a positive image of the U.S. Military among the indigenous population.

As was the case with exercise-related construction of facilities and training of Honduran forces, we do not dispute DOD's assertion that civic and humanitarian activities conducted during the course of Ahuas Tara II had distinct operational benefits (i.e. training experience of U.S. medical units) and contributed to U.S. regional readiness. Again, however, the fact that an activity carried out by DOD has a readiness or operational benefit does not mean that it may automatically be financed with O&M appropriations: that factor is but one [*56] of three that must be considered in making a determination as to proper funding source. Another source may be required if the activity is otherwise prohibited by law or falls within the scope of another category of appropriations. See p. 3 *supra*.

In this case, it is our view that civic/humanitarian assistance activities by DOD fall clearly within the scope of other appropriation categories and thus may not be financed with O&M funds. The types of civic and humanitarian assistance provided during the exercises are similar to those ordinarily carried out through health, education, and development programs under the Foreign Assistance Act of 1961, 22 U.S.C. § 2151 et seq., administered by the U.S. International Development Cooperation Agency (of which AID is a part). See Executive Order 12163, September 29, 1977, as amended. Funds for such foreign assistance activities are specifically provided by the Congress in annual appropriations acts. See e.g., Further Continuing Appropriations Resolution, 1984, Pub. L. No. 98-151, § 101(b)(1), 97 Stat. 964, 966 (1983). Alternatively, as noted above, minor assistance projects may be carried out where incidental [*57] to activities performed under authority of section 502 of the Foreign Assistance Act of 1961, 22 U.S.C. § 2302, or section 4 of the Arms Export Control Act, 22 U.S.C. § 2754. In either case, it is our opinion that DOD's operation and maintenance funds may not be used to finance such activities in light of the availability of other appropriations specifically provided therefor.

Based on the above, it is our conclusion that DOD's use of O&M funds to finance civic/humanitarian activities during combined exercises in Honduras, in the absence of an interagency order or agreement under the Economy Act, was an improper use of funds, in violation of 31 U.S.C. § 1301(a). As with DOD's use of O&M funds for training of foreign forces (and military construction in excess of that permitted under 10 U.S.C. § 2805(c)), such activities may

also have been performed in violation of the Antideficiency Act. DOD should make a final determination in this regard based upon the availability of alternate funding sources to reimburse the improperly used account.

III. SUMMARY

We have attempted, in the foregoing analysis, to address separately a number of different categories of activities carried out [*58] by DOD during the course of the Ahuas Tara II joint combined exercises in Honduras, to determine the propriety of DOD's financing of such activities as incidental operational expenses of these exercises. Although we recognize that most, if not all, of the activities examined in some way contributed to exercise requirements and to regional readiness goals, our analysis has focused upon other factors relevant to a determination of funding availability, particularly whether the activities in question fall more properly within the scope of another appropriation category.

Based upon this analysis, we conclude:

Exercise-related construction should not have been charged to O&M appropriations, except under authority of *10 U.S.C. § 2805(c)*, which permits the use of up to \$200,000 of O&M funds for minor military construction projects.

Operational expenses of radar installations in Honduras were properly charged to O&M funds. Site preparation and installation costs, however, should only have been funded with O&M if less than \$200,000 per project, pursuant to *10 U.S.C. § 2805(c)*.

In at least 3 instances, DOD provided training to Honduran armed forces in connection with the Ahuas Tara II [*59] exercises. Such training, comparable to that ordinarily provided through security assistance, should have been funded with security assistance appropriations.

Civic action and humanitarian assistance activities carried out by DOD during Ahuas Tara II were improperly charged to O&M funds as operational expenses of the exercises. Such activities should have been carried out under a reimbursable order under the Economy Act, *31 U.S.C. § 1585*.